Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of	)	
The Pay Telephone Reclassification	)	**CC Docket No. 96-128**
And Compensation Provisions of	)	
The Telecommunications Act of 1996	)	
	)	
RBOC/GTE/SNET Payphone Coalition	)	**NSD File No. L-99-34**
Petition for Clarification	)	

INITIAL COMMENTS OF IDT CORPORATION

Pursuant to 47 C.F.R. §§ 1.415 and 1.419 and in accordance with the Commission's *Public Notice*,[1] IDT Corporation ("IDT") submits its Initial Comments in response to questions raised in the Commission's *Further Notice of Proposed Rulemaking*.[2]

INTRODUCTION

With this *Further Notice*, the Commission is in a unique position: it may either maintain or revise the rules and regulations it implemented in the *Second Order on Reconsideration*,[3] which were subsequently vacated by the D.C. Circuit Court of Appeals[4] or it may maintain or revise the rules and regulations in place prior to the *Second Order.*

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[1] Comment Dates Set For Implementation Of The Pay Telephone Reclassification And Compensation And Compensation Provisions Rulemaking, *Public Notice*, CC Docket No. 96-128, DA 03-1886 (June 3, 2003).
[2] In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; RBOC/GTE/SNET Payphone Coalition Petition for Clarification, *Further Notice of Proposed Rulemaking*, CC Docket No. 96-128, NSD File No. L-99-34, FCC 03-119 (May 28, 2003)("*Further Notice*").
[3] In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; RBOC/GTE/SNET Payphone Coalition Petition for Clarification, *Second Order on Reconsideration*, CC Docket No. 96-128, NSD File No. L-99-34, FCC 01-109 (April 5, 2001)("*Second Order*").
[4] Sprint Corp. v. FCC, 315 F.3d 369 (D.C. Cir. 2003).

Since the implementation of the rules and regulation pursuant to the *Second Order*, the industry has had, in effect, a "trial period" for the new policies. Based on the evidence set forth below, it is IDT's position that the revised rules have not had their intended effect: to ensure that payphone service providers ("PSPs") receive "fair compensation" in a manner that is fair and reasonable to all affected members of the industry. For this reason, IDT recommends that the Commission not maintain the rules and regulations implemented in the *Second Order* – particularly the "first carrier pays" rule. Rather, IDT recommends that the Commission slightly modify – and perhaps codify - those rules and regulations in effect prior to the *Second Order* and strictly enforce those rules and regulations in order to ensure PSPs fair compensation.

In the *Further Notice*, the Commission asks four basic questions: "(1) are PSPs receiving fair compensation when a switch-based reseller is involved in the routing of a payphone originated call; (2) which facilities-based carrier in the call path is best able to track a completed call made from a payphone; (3) which facilities-based carrier is best situated both to compensate the PSP and seek reimbursement from other carriers that derive an economic benefit from the call; and (4) what type of contractual relationships for tracking and payment of payphone calls should the Commission permit as exceptions to its payphone compensation rules."[5]

In summary, IDT responds: (1) there is no evidence to indicate that PSPs are receiving compensation for calls to SBRs at a rate greater since the implementation of the "first carrier pays" rule than prior to its implementation – in fact compensation may have diminished; (2) the SBR is the *only* carrier in the call path that can track a completed call made from a payphone; (3) the SBR is best situated to compensate the PSP, thus avoiding the need to engage in difficult, contentious reimbursement arrangements with underlying carriers; and (4) the Commission should explicitly require SBRs to track and remit per-call compensation for completed calls directly to the PSP or via a third-party clearinghouse, as clearinghouses remain the most commonly used and efficient medium to remit per-call compensation. The basis for the above positions is supported by the fact that, under Commission precedent,[6] SBRs are the primary economic beneficiary of a toll-free call from a payphone and "the primary economic beneficiary of payphone calls should bear the cost of the call."[7] Additionally, the evidence overwhelmingly demonstrates that enforcement of the Commission's rules prior to the *Second Order*, with possibly certain minor modifications, will ensure that "[s]ufficient information about the reseller [is] being made available to the PSP,"[8] thus ensuring PSP access to the SBR for compensation. Further support for these positions is set forth below, in response to the additional questions posed by the Commission in the *Further Notice*.

[5] *Further Notice* at ¶ 16.
[6] *See*, WATS International Corp. v. Group Long Distance, *Memorandum Opinion and Order,* 12 FCC Rcd 1743 (1997).
[7] The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, *Report and Order*, Docket No. 96-128, 11 FCC Rcd 20,541 at 20,586 (1996)(*First Payphone Order*).
[8] *Second Order* at ¶ 15.

A. FAIR COMPENSATION

Whether the *Payphone Order on Reconsideration* And The *Coding Digit Waiver Order* Ensured That PSPs Receive Fair Compensation.

To the degree that PSPs may not have received fair compensation for calls routed to SBRs – and IDT disputes claims by PSPs to this effect[9] – there is no basis to conclude that the regulations implemented in the *Payphone Order on Reconsideration*[10] and The *Coding Digit Waiver Order*[11] were insufficient to meet the needs of PSPs to ensure access to the responsible entities for per-call compensation. Under the regulations set forth therein, IXCs had clear responsibilities to provide PSPs with sufficient information regarding the responsible party for their toll free numbers. IDT concedes that it is possible that IXCs may have failed to provide the required information to PSPs, thus disabling PSPs from receiving compensation from the appropriate party – the SBR. However, in such an instance, the IXC would be in clear violation of the Commission's rules and the liability would fall upon the IXC.[12] Therefore, considering whether to maintain the regulations imposed under the *Second Order* or whether to return to a compensation scheme in place prior to the *Second Order* raises two fundamental

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[9] For example, in the *Second Order,* the Commission cited the Coalition claim that "from 20 to 50 percent of revenues from major IXCs and up to 100 percent of revenues from smaller IXCs for calls routed through a switch based reseller go uncollected" when, at the same time, the Coalition claimed that it was not being informed as to whether calls were being sent to resellers, compelling the question "How does the Coalition know the calls in question were actually routed through a switch based reseller?" Similarly, the Commission cited claims that BellSouth, SBC, Ameritech and APCC filed requests for payment with IXCs and SBRs and received limited responses and/or payment as evidence that IXCs and SBRs were avoiding payment responsibilities when there is no evidence demonstrating that individual respondents actually had payment responsibilities in the first place. *Second Order* at FN 22.

[10] The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, *Order on Reconsideration*, Docket No. 96-128, 11 FCC Rcd 21,233 (1996) (*Payphone Order on Reconsideration*).

[11] The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, *Memorandum Opinion and Order*, Docket No. 96-128, 13 FCC Rcd 10,893 (1998) (*Coding Digit Waiver Order*).

[12] "Facilities-based IXCs and switch based resellers may not avoid compensating PSPs by withholding the name of the carrier responsible for paying per-call compensation, thereby withholding the requirements of the Payphone Orders and Section 276." *Bell Atlantic – Frontier Order* at ¶ 9 (Footnote omitted)

questions: were the obligations placed on IXCs to provide SBR contact information to PSPs too confusing or burdensome or were they clear and reasonable and simply require greater enforcement? Throughout this proceeding, it has been IDT's position that the provision of SBR contact information was clear and no more burdensome than the information the IXC had to provide for itself and any IXC failure to provide such information compelled enforcement – not a wholesale revision of the Commission's regulations.

Indeed, IXCs' obligation (and the clarity and reasonableness of that obligation) was affirmed by the Commission in the *Bell Atlantic – Frontier Order*,[13] wherein the Commission held that:

> *The Coding Digit Waiver Order* specifies that a facilities-based [IXC] … must indicate, on request by the billing PSP, whether it is paying per-call compensation for a particular 800 number. If it is not, then it must identify the switch-based reseller responsible for paying payphone compensation for that particular 800 number. We likewise conclude that, in order to receive tracking information, a PSP must inquire in writing whether a facilities-based IXC will be paying per-call compensation relating to a particular toll-free number. If the IXC will not be the paying party because it transferred the call to a switch-based reseller, it is incumbent upon the IXC at that juncture to identify the reseller.[14]

Based on the above statement, IDT simply cannot comprehend that there "remained confusion" as to IXC, PSP and SBR responsibilities regarding per-call compensation.

Yet if there *was* any confusion, the confusion seems to have been at the Commission, for on the very same day the Commission released the two following statements:

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[13] In re Bell Atlantic-Delaware, Inc. v. Frontier Communications Services, Inc.; Bell Atlantic-Delaware, Inc. v. MCI Telecommunications Corp., File No. E-98-48, File No. E-98-49, *Memorandum Opinion and Order*, 16 FCC Rcd. 8112 (2001) ("*Bell Atlantic-Frontier Order*")
[14] *Bell Atlantic – Frontier Order* at ¶ 15 (Footnotes omitted).

> The logical construction of the language from the *Coding Digit Waiver Order* requires a first facilities-based carrier to pay unless the reseller has identified itself to the first facilities-based carrier as being responsible for paying compensation.[15]

> [T]he Commission's decision in the *Payphone Order on Reconsideration* leaves switch-based resellers in the position of having to identify themselves voluntarily to the IXC as the party liable for paying compensation to PSPs, and that resellers have had little incentive to do so.[16]

When read together, the two statements fail to support the Commission's conclusion that PSPs fail to receive compensation from SBRs due to their failure to identify themselves to the PSP. In the first statement, the Commission acknowledges that unless the SBR has informed the IXC that the SBR accepts responsibility for its per-call compensation, the IXC shall be liable. Yet in the second statement, the Commission *wholly revised the then-existing compensation regime* on the mistaken claim that PSPs are not compensated because SBRs do not "come forward." However, the first-statement is clear: if the SBR does not come forward to the IXC, PSP compensation is the IXCs' responsibility and the PSP must look no further. Where the SBR has come forward to the IXC, the IXC must provide the PSP with the SBRs contact information. It is that simple.

It is the position of IDT that the interpretation of the aforementioned parties' responsibilities, as set forth in the *Order on Reconsideration*, *Coding Digit Waiver Order* and reaffirmed in the *Bell Atlantic – Frontier Order*, if abided by the parties and enforced by the Commission meets the needs of PSPs to identify and contact SBRs for payment of per-call compensation.[17] Unfortunately, the Commission simultaneously released the *Bell*

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[15] *Bell Atlantic – Frontier Order* at ¶ 14.
[16] *Second Order* at ¶ 15.
[17] *E.g.,* "APCC argues that: PSPs are left with several burdensome tasks: (1) identifying those switch-based resellers that are receiving a significant volume of calls from payphones and who are therefore worthwhile candidates for lawsuits to enforce payment; (2) identifying which of those resellers are "switch-based"

Atlantic – Frontier Order with the *Second Order*, so the Commission has never been able to adequately test the industry's understanding of its obligations since the clarification provided in the *Bell Atlantic – Frontier Order*. IDT believes that the time is now for the Commission to recognize that it established reasonable and efficient obligations upon IXCs, SBRs and PSPs in the *Order on Reconsideration* and *Coding Digit Waiver Order* and that it enforce the requirements set forth therein, rather than maintain the "first carrier pays" rule and the market-deforming responsibilities that flow thereunder, as provided for the *Second Order*.

In the *Bell Atlantic – Frontier Order,* the Commission stated that "[B]ecause this issue has come before us as part of a section 208 complaint proceeding regarding past behavior, we are constrained to interpret our current regulations and orders."[18] Thus, in the event that the Commission is concerned that the IXC obligations should be codified, at **Exhibit A,** we have put forth a proposed revision of the (pre-*Second Order*) per-call compensation regulations to further clarify each parties' responsibilities in the compensation process. IDT asserts that, whether codified or not, each party's responsibilities are sufficiently clear so as to eliminate any alleged confusion.

Whether Prior To The Rules Adopted In The *Second Order on Reconsideration*, PSPs Received Full Per-Call Compensation For Calls That Involved Switch-Based Resellers.

The record is unclear as to whether PSPs received full per-call compensation for calls that involved switch-based resellers prior to the rules adopted in the *Second Order*. If the Commission actually looks at the allegations made by PSPs, they are not so much that SBRs were identified by the IXC as the liable party and refused payment when

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resellers; (3) finding those resellers; and (4) extracting payment from each of these resellers." *Further Notice* at FN 45.

contacted by PSPs, but rather that "IXCs unilaterally determine that they are not responsible for paying compensation for calls routed to switch-based resellers, but at the same time the IXCs do not identify which resellers are responsible for compensation, even when the PSP requests this information."[19] This does not demonstrate that the calls in dispute were sent to resellers and the resellers refused payment. The statement demonstrates that IXCs *claimed* that the calls were sent to resellers and that the IXCs would not abide by their responsibilities under the *Order on Reconsideration* and *Coding Digit Waiver Order* to provide required information to PSPs to contact SBRs for payment. There is no evidence to demonstrate that, in fact, the calls were actually sent to SBRs.

If PSPs Did Not Receive Fair Compensation Prior To The *Second Order on Reconsideration*, Did The *Order* Address, In Full Or In Part, The Alleged Compensation Problems? How Have The FCC's Rules Worked Or Failed In Their Purpose?

Even if PSPs did not receive fair compensation prior to the *Second Order*, the *Second Order* either failed to address the compensation problems or simply created new, greater problems. Since the only truly meaningful compensation issue is whether PSPs are receiving fair compensation, the question is, "Are PSPs now receiving fair compensation?" Based on the evidence submitted by the PSPs, the answer is "No." By placing the obligation to remit per-call compensation solely on IXCs, the Commission severely limited the number of potential payors. However, it also greatly increased the liability per payor. As a result, where a payor has failed to remit per-call compensation under the "first carrier pays" rule, PSPs have failed to receive fair compensation for a far greater number of calls. Indeed, the APCC has informed the Commission that "As a

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[18] *Bell Atlantic – Frontier Order* at ¶ 16.

result of the [WorldCom and Global Crossing bankruptcy] filings, independent PSPs lost more than an entire quarter of dial-around payments from each carrier, a loss totaling more than $10 million."[20] And while some might see the aforementioned bankruptcies as an anomaly, even APCC concedes that "Given the state of the telecommunications industry, it is likely that other long distance carriers will enter bankruptcy in the future."[21] While some might argue that the Commission should simply "fix" bankruptcy, that is both beyond the scope of this proceeding and is, by its very nature, a particularly difficult, contentious issue to "fix," and cannot be expected to be done anytime in the foreseeable future.

As demonstrated throughout IDT's Comments, the rules have also failed to protect SBRs from having to remit more than fair compensation. Since the imposition of the *Second Order*, SBRs have seen their costs per completed call increase between 8% and 20%, with increases of up to 75% per completed call pending. By imposing a compensation scheme that compels SBRs to remit a higher per-call rate, the Commission has failed to protect SBRs against abuses to the system by the IXCs.

Are PSPs Currently Receiving Fair Compensation From Switch-Based Resellers?

If the definition of "fair compensation" is "compensation for each completed payphone call," then clearly, PSPs are not currently receiving fair compensation for calls sent to SBRs. First, as demonstrated in the WorldCom and Global Crossing bankruptcies, IXCs have failed to remit payphone compensation to PSPs that otherwise

[19] *Second Order* at ¶8 (Emphasis added).
[20] "Comments of the American Public Communications Council," In the Matter of Request to Update Default Compensation Rate for Dial-Around Calls from Payphones, *Request That The Commission Issue A Notice Of Proposed Rulemaking (Or In The Alternative, Petition For Rulemaking) To Update Dial-Around Compensation Rate,* (August 29, 2002) *("*APCC Comments") at 15.
[21] APCC Comments at 15.

would have been paid to PSPs if SBRs were permitted to remit directly to PSPs. Additionally, IDT believes certain IXCs are withholding per-call compensation to PSPs when the IXCs' SBR customers have not paid as a result of a dispute or SBR financial trouble or bankruptcy. For example, where an IXC believes that it may not be able to recover payments to PSPs for amounts owed by its SBR customer, the IXC simply treats the calls to the SBR as non-completed, rather than pay the PSP. Because the IXC can, in essence, "bury" these calls within its total number of calls, PSPs may be unaware that they are not being compensated, whereas if the SBR was required to pay the PSP directly, it would be clear to the PSPs that payment was not forthcoming. As a result of these two areas of concern, PSPs are not receiving compensation for SBR calls that may have been remitted if a SBR/PSP direct relationship were permitted.

Does The Ease Of Market Exit Make It Difficult For PSPs To (1) Locate Resellers And (2) Obtain Compensation?

The very premise of this question is flawed, and there is no evidence to indicate that it is more difficult to either locate switch-based resellers or obtain compensation. SBRs have largely the same state and federal market exit requirements as facilities-based carriers. The Commission seems to be confusing switchless resellers with switch-based resellers. Arguably, switchless resellers, with their lack of equipment and occasional lack of familiarity with – or fealty to – Commission regulations, may be able to exit markets quickly. Whether or not this is the case, however, is irrelevant for the purposes of this proceeding, as switchless resellers' per-call compensation is paid by the IXC that provides the switched service. This shall not change (as it did not under the *Second Order*) if the Commission declines to extend the regulations set forth in the *Second Order*.

Under the Commission's regulations prior to the *Second Order* and under the regulations proposed by IDT in the proceeding, IXCs had and will continue to have the obligation to provide PSPs with the same degree of contact information of their SBR customers that the IXCs will provide to the PSPs for itself. The PSPs argument that "resellers" could simply "keep their heads down" to avoid per-call compensation is baseless: as long as the IXCs adhered to the rules, it would be virtually impossible for SBRs to avoid PSPs.[22] Thus, the answer is – as it has always has been – to ensure that IXCs are providing PSPs with information on their SBR customers. Furthermore, there is no evidence that PSPs have greater difficulty obtaining compensation from SBRs. In fact, the reverse is the case: PSPs have trouble collecting from IXCs.[23] As demonstrated above, Global Crossing and WorldCom failed to contribute over $10 million to PSPs in one quarter alone. This figure does not even include additional disputed contributions. Indeed, PSPs currently have or recently have had lawsuits against every major IXC.[24] Moreover, as demonstrated by the above figure, when an IXC fails to submit payment to PSPs, the ramifications are much greater than if an SBR, which is often a small entity with proportionally smaller compensation obligations, fails to pay. In conclusion, there is no basis to conclude that resellers present a greater payment risk than IXCs.

Whether PSPs Have Access To Adequate Avenues Of Relief In Instances Where PSP Rules Are Violated.

[22] Despite how the APCC and Commission have often framed the issue, the issue does not pertain to all resellers, but rather, only switch-based resellers. Per-call compensation for switchless resellers remains the obligation of the IXC.

[23] ("The RBOC/GTE/SNET Payphone Coalition (Coalition) claims that from 20 to 50 percent of revenues from major IXCs … go uncollected.") *Second Order* at FN 22.

[24] *See,* APCC Services, Inc. *et al.,* v. WorldCom, Inc., Civil Action No. 01-638 (ESH); 2001 U.S. Dist. LEXIS 23988 (December 21, 2001), wherein APCC filed suit again WorldCom, Inc., Qwest and Sprint. The decision also mentions refers to suits by APCC against AT&T, Cable and Wireless and Global Crossing.

PSPs have the same access as any other aggrieved party to determine whether the Commission's rules have been violated. In those instances where the Commission or some other appropriate body determines that the Commission's rules *have* been violated, PSPs have the same rights as any other entity to be made whole. Indeed, the Commission's Market Disputes Resolution Division's webpage (http://www.fcc.gov/eb/mdrd/Items.html) lists thirty-five decisions since January 1, 2001 regarding complaints brought by the payphone industry. Clearly, the PSP industry has adequate avenues of relief. There is simply no basis in this proceeding or any other to give PSPs rights that exceed those afforded to other aggrieved parties before the Commission.

Are There Any Alternatives To The Rules Adopted In The *Second Order On Reconsideration* That Would Ensure Fair Compensation?

There are alternatives to a "first carrier pays" model that ensure fair compensation and prevent IXC abuses in the marketplace. Enforcement of and, if necessary, codification of the IXC, SBR and PSP obligations set forth in the *Payphone Order on Reconsideration* and The *Coding Digit Waiver Order* and affirmed in the *Bell Atlantic – Frontier Order* will set forth each party's obligations. These obligations direct the PSP to contact the IXC for payment; compel the IXC to notify the PSP of the responsible SBR and mandate that the SBR provide per-completed call tracking and compensation for all calls sent to its switch and subsequently answered by the called party, removing the concern that "an IXC and a switched-based reseller [may] determine, independently, that neither is responsible for compensation on a call."[25]

[25] *Second Order* at ¶ 8.

This system more than adequately addresses three of the four "burdensome tasks" involved in receiving fair compensation alleged by PSPs: "(1) identifying those switch-based resellers that are receiving a significant volume of calls from payphones and who are therefore worthwhile candidates for lawsuits to enforce payment; (2) identifying which of those resellers are 'switch based' resellers; [and] (3) finding those resellers.[26] Indeed, by providing *all* of the SBRs to PSPs, this method provides greater notice to PSPs than they have sought in the past. The final "burdensome task" of "extracting payment from each of these resellers"[27] is still required, but, since there is no evidence that SBRs, when presented with a legitimate request for payment, are any less likely to pay than IXCs paying on behalf of SBRs, there is no reason to retain the "first carrier pays" methodology. Finally, a minor, yet relevant benefit to PSPs of requiring SBRs to remit per-call compensation on their own behalf is that in the event an untimely or incomplete payment is made by an SBR, SBRs, with their limited resources are in no position to engage PSPs in time-consuming and lengthy litigation in a manner similar to the large IXCs. Thus, PSPs are undoubtedly *more likely* to recover from a SBR than an IXC as a result of a dispute.

Should The Commission Consider A "Set-Use Fee" System, A "Proxy Call Completion Methodology," And An IXC "Hand-Off" Proposal?

For the reasons previously stated by the IDT in this proceeding,[28] which are incorporated herein by reference, IDT does not support any of the aforementioned proxy

[26] *Third Order on Reconsideration* at FN 45.
[27] *Id.*
[28] *See*, "Initial Comments of IDT Corporation," In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; RBOC/GTE/SNET Payphone Coalition Petition for Clarification, *Second Order on Reconsideration*, CC Docket No. 96-128, NSD File No. L-99-34, (October 9, 2001); "Reply Comments of IDT Corporation," In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the

methods for determining call completion. The Commission has already considered and rejected a “hand-off” proposal. In doing so, it stated, “[the] proposed redefinition of completed calls is inconsistent [with] Section 276 of the Act, which requires the Commission to ensure that PSPs are ‘fairly compensated for each and every *completed* intrastate and interstate call using their payphones. Moreover, [the] proposed redefinition runs contrary to our longstanding definition of ‘completed’ calls to mean calls completed to the called party.”[29] IDT agrees with this conclusion and recommends that the Commission maintain its stated position. Furthermore, such an analysis must apply to any of the proxies set forth in the *Further Notice*. Therefore, none of the proposed proxies would meet the statutory definition of a “completed call,” and, as such, must be rejected.

Telecommunications Act of 1996; RBOC/GTE/SNET Payphone Coalition Petition for Clarification, *Second Order on Reconsideration*, CC Docket No. 96-128, NSD File No. L-99-34, (October 4, 2001).

[29] Third Order on Reconsideration at ¶ 7.

B. CALL TRACKING AND REPORTING

Call Tracking From The IXC To The Switch-Based Reseller To The Called Party

Whether The First IXC In The Call Path Has Been Able To Track, Or Make Arrangements To Track, Completed Coinless Calls

When an IXC hands a call off to a SBR for call completion, the IXC loses the ability to track the call to completion. Thus, the IXC must rely on the SBR for call completion data. It has been IDT's experience that there has been great difficulty with SBRs reaching agreements with IXCs to track calls on their behalf. While IXCs and SBRs maintain a relationship, this relationship has been severely harmed by making the IXC, in effect, the agent of the PSP. IDT asserts that in order to eliminate this harm, the Commission must re-establish the IXCs limited duty to inform PSPs of SBR contact information and the SBR's duty to track and report per-call compensation directly to the PSP or a clearinghouse for the benefit of the PSP.

How Have IXCs Been Tracking Compensable PSP Calls Delivered To Their Reseller Customers Since The *Second Order On Reconsideration* Was Issued*?*

IXCs have been unable to track compensable PSP calls to their reseller customers. Thus, the IXC relies on the ability of the SBR to track its completed calls accurately and to report them honestly. If the SBR fails to do either, the IXC is not aware that it is under compensating the PSP, thus placing itself subject to liability for failure to fully remit per-call compensation to PSPs. IDT believes it is inappropriate for IXCs to bear this burden and recommend that SBRs have the obligation – and liability - to track, report and remit per call compensation accurately.

Whether Parties Have Entered Into Clearinghouse Arrangements To Track Coinless Calls And Whether Such Arrangements Have Resulted In Satisfactory Compensation Mechanisms For PSPs

Clearinghouses do not track coinless calls. Clearinghouses service to "match" reported completed calls to the applicable PSP. Clearinghouses served this role prior to the *Second Order* and they continue to serve in a nearly identical manner. The sole difference in the clearinghouses' role since the *Second Order* is that SBRs first remit their completed call data to IXCs who then pass along this information to the clearinghouses instead of SBRs remitting directly, as done previously. In essence, all the Commission has done is added an additional responsibilities for the IXC, additional costs for the SBR and an additional layer of bureaucracy for all. Regardless, clearinghouses remain a vital partner in the compensation process and, along with the Commission reestablishing SBRs right to compensate PSPs directly, the Commission should affirm the vital role of clearinghouses by explicitly permitting PSPs to remit call tracking information directly to a clearinghouse rather than to PSPs directly.

Whether The IXC Or the Switch-Based Reseller Is Best Suited To Determine Whether A Payphone Originated Call Has Been Answered By The Called Party

In the *Second Order*, the Commission wrote, "Our decision here to make the first underlying facilities-based interexchange carrier responsible for compensating the PSP is based in large part on the fact that only the first underlying interexchange carrier is reasonably certain to have access to the information necessary for per call tracking or to be able to arrange for per call tracking in its arrangements with switch-based resellers that complete calls.[30] Yet this assumption is based on a misunderstanding. Where a call is passed to a SBR, the SBR is the *only* entity reasonably certain to have access to the information necessary for per call tracking and, as the primary economic beneficiary of

[30] *Second Order* at ¶ 16.

the call, is the most appropriate entity to provide per call tracking to PSPs, thus underscoring the need for SBRs to have the right and responsibility to provide tracking and compensation directly to PSPs.

Which Facilities-Based Carrier Most Reasonably Would Have Facilities In Place, Or Could Build Such Facilities To Track Calls To Completion

As noted above, only the SBR has the facilities in place to track a call to completion. Despite the claims of some (which have been denied by the major IXCs), IXCs cannot build facilities to track calls to completion after the calls have been handed to a SBR.

Which Carrier Has Access To The Most Information For Call Tracking And Whether There Are Any Technological Differences Between An IXC's And A Switch-Based Reseller's Ability To Track Calls? Is One Better Than The Other?

As noted above, only the SBR has access to the information necessary to determine call completion. This access is based on the equipment of the SBR that is used to bill for the call. For example, if a SBR calling card provider was not able to determine if its customer's call completed, the provider could never debit the calling card for the cost of the completed call. Similarly, if the provider did not know if the call was originating from a payphone, it could not debit the card for the payphone surcharge, thus simultaneously forgoing the opportunity to recover its costs for payphone compensation. IXCs do not possess equipment that can track a call upon termination to the SBRs' switch. Thus, SBRs are clearly the better-situated party to track calls to completion.

Is It Technically And Administratively Feasible To Split Tracking Responsibilities Between IXCs and Resellers?

It is neither technically nor administratively feasible to split tracking responsibilities between IXCs and resellers, as IXCs cannot track completed calls. Since only completed calls are compensable, IXCs, which can only track the total number of calls sent to SBRs, provide no information ultimately relevant or required under the Commission's rules and regulations to the PSP.

What Effect Does The IXCs Contractual Relationship With A Reseller Have On The Commission's Analysis?

When the Commission imposed the "first carrier pays" rule in the *Second Order*, the Commission labored under the guise that "underlying facilities-based carriers, who have a customer relationship with resellers, are in a far better position to track the calls and provide adequate information to PSPs to ensure that they are compensated for every compensable call."[31] Yet as demonstrated above, IXCs are in absolutely no position to track SBR completed calls and, since virtually all IXCs and SBRs used clearinghouses, were in no better position to provide adequate information to PSPs. The Commission should focus on fostering a relationship between the SBR – the primary beneficiary of the payphone call – and the PSP – the ultimate recipient of the per-call compensation, rather than trying to eliminate the SBR from the compensation process.

Can IXCs Work With Switch-Based Resellers To Review And Reconcile Call Data Records To Track Calls?

IXCs cannot work with SBRs any more closely than PSPs. IXCs, like PSPs, know how many calls are sent to a SBR, but do not know how many were completed. Since the ultimate recipient of the per-call compensation is the PSP, it should be the PSPs obligation to work with the SBR to reconcile call data records.

Have IXCs Been Able To Use Their Customer Relationships With Switch-Based Resellers To Obtain Contractual Cooperation From The Switch-Based Resellers In Tracking Calls To Completion?

[31] *Second Report* at ¶ 16.

As with many questions raised by the Commission in this proceeding, this contains an unfair, unsupported bias, namely, the inference that only through contractual obligation will SBRs track and remit per-call compensation on their own behalf. Despite all the rhetoric by PSPs, there is simply no evidence that when SBRs notified IXCs of their intent to remit per-call compensation that; (1) PSPs requested per-call compensation from IXCs; (2) IXCs properly provided PSPs with the contact information of their SBR customers; (3) PSPs contacted these SBRs for compensation; and (4) SBRs declined to provide lawful compensation. IDT believes that in order to preserve the IXC/SBR relationship, which has been harmed greatly as a result of this proceeding, that the IXC's role in the SBRs per-call compensation should be limited to providing the PSP with the SBRs contact information, whereby the PSP may contact the SBR and receive per-call compensation directly or through a third-party clearinghouse.

If The Commission Retains Rules Requiring IXCs To Track Calls, Should The Commission Also Promulgate Rules Imposing Obligations On Switch-Based Resellers To Cooperate In Call Tracking And Compensation?

Absent any Commission-imposed requirement to track and remit completed calls, the SBR has no legal obligation to do so, although it may have a contractual obligation to the IXC. IDT recommends that, if the Commission retains the "first carrier pays" rule, the Commission not further enter into the relationship between the IXC and SBR. Rather, the Commission should decline to require the IXC to track and report calls passed to a SBR and instead limit the IXCs obligation to inform the PSP of the contact information for its SBR customer.

Where There Are Multiple Switch-Based Resellers Or IXCs In the Call Path, What Obligations, If Any, Should The Commission Impose Regarding Tracking A Payphone Call To Completion?

Where multiple SBRs are in a call path, the obligation to track and remit per-call compensation liability should be on the final SBR, which is consistent with IDT's position that: (1) the primary economic beneficiary of the call should be responsible for its PSP compensation; and (2) only the SBR knows whether a call has been completed and, as such, is capable of providing tracking information. Since, where multiple SBRs are in a call path, the IXC may be unaware of the final SBR, the SBR that is listed by the IXC (*i.e.,* the SBR that has the direct relationship with the IXC), when contacted by the PSP, should be obliged to provide the same degree of contact information for its SBR customer that the IXC is required to provide. In the few instances where a "chain" of SBRs exists, the obligation to provide information on the final SBR extends to each SBR "link" in the chain downward. Additionally, as where an IXC refuses a lawful request to provide contact information on an SBR customer, or an SBR refuses to give the contact information of *its* SBR customer, the entity that fails to adhere to the Commission's rule to disclose customer contact information should be liable for the applicable per-call compensation.

Does Not Mandating A Standardized Technology And Permitting Clearinghouses Avoid Placing A Technological Burden On The Facilities-Based Carrier That Is Required To Track Coinless Calls?

IDT does not support mandating standardized technology. IDT encourages the use of clearinghouses. Other than ensuring that sufficient SBR contact information and sufficient per-completed call information is available to PSPs, IDT does not support any Commission attempts to constrain the relationship between IXC, SBR and PSP.

Does It Make A Difference Which Facilities-Based Carrier Tracks Payphone-Originated Calls?

As noted above, only the final SBR is in a position to track a call to completion. Thus, it is imperative that this SBR be in a position to track, report and remit per-call compensation on its own behalf.

Reporting Requirements

Should Alternative Reporting Requirements Be Adopted?

Other than permitting SBRs to affirmatively decide to compensate PSPs directly or via a clearinghouse, IDT does not propose any alternative reporting requirements.

Should The Facilities-Based Carrier That Tracks Coinless Calls Also Be Responsible For Providing Tracking Reports to the PSP?

Yes. PSPs gain no benefit from having a SBR prepare a tracking report, submit the report to the IXC, then have the IXC incorporate that report into a larger report and then submit it to a clearinghouse for the PSP. In fact, individual SBR tracking reports are undoubtedly better for PSPs because it permits them to determine those carriers that are the more significant service providers and, as such, present greater risk of loss in case of fraud or non-payment.

Are There Any Administrative, Technical, Or Financial Burdens Involved In Generating Such Reports?

There are considerable administrative, technical and financial burdens placed upon SBRs to provide tracking reports. In particular, IXCs request information in different formats, thus requiring SBRs that receive underlying service from more than one IXC to segregate and manipulate data in ways not required prior to the *Second Order*. Additionally, SBRs must prepare this information monthly, in accordance with the IXC billing cycle, rather than quarterly, in accordance with the PSP compensation cycle, thus placing an enormous strain on SBRs' staff. Finally and most significantly, SBRs are required to remit per-call compensation to IXCs monthly, rather than quarterly – as done prior to the *Second Order*, thus giving IXC's an "interest free loan," as they are only required to remit compensation to PSPs quarterly. This is particularly unfair because a component of the default compensation rate is the period providers get to "hold" the revenue. Since SBRs do not get to "hold" the revenue as contemplated when the default rate was set, but IXCs do get to hold the revenue for their completed dial around calls, imposing the default rate upon SBRs is unjust and unreasonable as it discriminates against SBRs. As a result, if the Commission maintains its "first carrier pays" rule, it should eliminate the portion of the default compensation rate for SBRs or, in the alternative, require SBRs to remit compensation to IXCs on a quarterly, rather than monthly basis.

Is The Information Requested By Such Reports The Type Of Information That The IXCs Or The Switch-Based Resellers Would Maintain Regardless Of A Commission Rule?

As noted above, because SBRs require call completion records to bill their customers, the information requested would generally be maintained regardless of a Commission rule. However, the format of the information and the frequency with which it must be produced has been greatly, negatively impacted by the Commission's rules.

Compensation for Tracking and Reporting

Whether IXCs Have Taken Advantage Of Their Ability To Recover Their Tracking And Reporting Costs As Permitted By The *Second Order on Reconsideration*.

IXCs have clearly taken advantage of their ability to recover their tracking and reporting costs, thus gravely injuring their SBR customers and placing these customers at a competitive disadvantage in the consumer marketplace. Upon the imposition of the “first carrier pays” rule, IXCs generally imposed a two to five cent per-completed call surcharge on their SBR customers. While no figures were provided in support of this increase, the marketplace adjusted, if for no other reason that there was no alternative but to pay the 8 – 20% increase above the default per-call compensation rate. IDT believes that the Commission should investigate the IXC’s increases, as, based on IDT’s commercial dealings with the IXCs, the sole revision to the manner in which IXCs remitted compensation for their own completed calls was to remit their SBR customers’ completed calls along with their own to the clearinghouses they used prior to the imposition of the “first carrier pays” rule. While an increased amount of call records undoubtedly required increased payments to their clearinghouse partners for additional call matching with PSPs, based on IDT’s previous relationships with clearinghouses and our familiarity with their rates, we believe IXCs have used their increased reporting obligations as a basis for an alternate source of revenue.

If the IXCs increase of two to five cents was mildly egregious, their actions subsequent to the FCC’s *Fifth Order on Reconsideration*[32] have demonstrated beyond a shadow of a doubt that IXCs are using their market dominance in the toll free service market to take advantage of SBRs and recover costs completely unrelated to the per-call compensation of their SBR customers. For example, one major IXC informed its SBR customers that “Pursuant to [the *Fifth Order on Reconsideration*], the FCC established new amounts of compensation owed to payphone service providers whose payphones are served by switches that do not transmit payphone-specific coding digits. Therefore, in accordance with the terms of your services agreement … your payphone surcharge will be $.43 per call." IDT has been informed – although it has not yet received any such documentation – that other dominant IXCs will be increasing their rates in a similar fashion.

This abuse is not surprising to IDT. Indeed, on October 9, 2001, IDT wrote the Commission::

> [T]here is nothing in the Commission's rules to prevent the facilities-based carriers from taking gross advantage of their new position. For example, facilities-based carriers could agree to remit to PSPs $0.50 per call sent to a SBR. Under the Commission's rules, there is nothing to prevent this. Moreover, since the carriers that dominate the toll-free origination service market[33] have effectively colluded to ensure nearly identical positions, SBR customers cannot find an alternative service provider with more reasonable rates and terms. As a result, SBRs would have no alternative but to pay the increased, anti-competitive per-call compensation rates established by facilities-based carriers and PSPs.[34]

With the planned increases by IXCs to allegedly recover costs imposed by the *Fifth Order on Reconsideration,* this prophecy has effectively come true.

This evidence demonstrates the perverse effect of the "first carrier pays" rule: PSPs are no more likely to receive per call compensation, while SBRs are being forced to pay up to 75% more than the Commission-set default rate. Such an outcome is unacceptable. For this reason, as well as the many other reasons set forth in IDT's Comments, the Commission must require SBRs to remit per-call tracking and

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[32] In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, *Fifth Order on Reconsideration and Order on Remand*, CC Docket No. 96-128, FCC 02-292 (October 23, 2002) (*"Fifth Order on Reconsideration*").

[33] A 1997 Report by Frost and Sullivan, provided as an attachment to "*Ex Parte* Letter from Larry Fenster to Magalie Roman Salas," Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, RBOC/GTE Interim Compensation Proposal, CC Docket No. 96-128 (September 27, 2001) reveals that, as of 1996, AT&T, Worldcom (then MCI Communications and WorldCom) and Frontier (now part of Global Crossing) held 84.1% of the Domestic Interexchange Carrier Toll-Free Services Market by revenue.

[34] "Initial Comments of IDT Corporation," In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; RBOC/GTE/SNET Payphone Coalition Petition for Clarification, *Second Order on Reconsideration*, CC Docket No. 96-128, NSD File No. L-99-34, (October 9, 2001) at 46.

compensation directly to PSPs. If, in the event the Commission declines to do so, it should prohibit IXCs from charging SBRs above the default rate.

Have IXCs Installed New Software Or Built New Facilities To Track And Report Calls In Response To The *Second Order On Reconsideration*?

On information and belief, IXCs have not installed new software or built any new facilities to track SBR completed calls. Additionally, except for incorporating SBR completed calls in a file that contains the completed calls of the IXC and its other SBR customers, IXCs have not installed any new software or built any new facilities to report calls.

Have the IXCs sought and successfully received compensation from switch-based resellers?

It is IDT's understanding that while many IXCs have received compensation from SBRs, there have been innumerable instances where IXCs have not. These instances have included disputes over per-call compensation as well as disputes unrelated to per-call compensation, as well as instances where SBRs have simply not paid their bills. Moreover, as noted above, even if IXCs have received compensation from SBRs, their compensation is based on the reports of SBRs that may, or may not be accurate. If the SBRs reports are inaccurate, the IXC will be liable to the PSP for any underpayment by the SBR. Additionally, as demonstrated by the WorldCom and Global Crossing bankruptcies, there have been instances where IXCs have received compensation from SBRs but that compensation has not been forwarded to PSPs, thereby unjustly enriching IXCs at the PSPs' expense.

Have The Costs Of Any New Facilities Or Software Been Passed On To The Calling Party Or The Called Party?

While IXCs have not had any new costs for facilities or software, increased per-call compensation costs place upon SBRs have been passed onto end users. Additionally, if IXCs are permitted to raise per-call compensation costs 75% or more, as currently planned, SBRs will be force to pass along these costs to consumers as well.

What Types Of Compensation Arrangements Currently Exist Between IXCs And Switch-Based Resellers?

Generally, IXCs demand between $0.02 and $0.05 per completed call in addition to the default rate of $0.24 per completed call. As noted above, at least one major IXC has contacted IDT and informed the Company that it will add $0.19 to the default rate for a total of $0.43 per completed call. IDT has heard – but has not received confirmation – that other IXCs plan similar increases. IDT believes that these IXCs are imposing these increases in part to gain a competitive advantage over SBRs in the market. For example, IDT does not expect these IXCs to charge $0.43 for payphone compensation to their end-user calling card and dial-around customers, whereas IDT will be force to charge that much, if not more, to its customers. This presents great difficulty, particularly in the "private label" calling card business, as the calling card service providers' marketing partner (*e.g.*, Sam's Club, K-Mart, Wal-Mart, etc.) will often not permit such a high payphone surcharge. Additionally, certain state PUCs will not permit such a high payphone surcharge, thus making SBRs incur a loss for each call made from a payphone.

Should The Commission Continue The Practice Of Permitting The Facilities-Based Carrier To Recover Its Costs From The Other Facilities-Based Carrier?

For the reasons stated herein, IDT does not believe that the Commission should retain the current compensation scheme, wherein an IXC remits on behalf of its SBR customer. However, if the Commission retains the current scheme, it should prevent

IXCs from padding the costs of per-call compensation, making IXCs "pass through" the default rate paid to the PSPs. Similarly, the Commission should not permit IXCs to remit more than the default rate to PSPs on behalf of their SBR customers, as to permit otherwise would raise concerns of collusion (*i.e.,* the IXC remits a higher rate for its SBR customers and lower rate for itself, thus creating a greater competitive advantage for itself in the marketplace). The record in this proceeding has demonstrated that IXCs do not engage in tracking of their SBR customer's calls and that their reporting simply consists of resending completed call records prepared by the SBR to a clearinghouse, all of which are costs IXCs incur regardless of whether they are remitting on behalf of their SBR customers or not. Moreover, the record demonstrates that IXCs have abused the right to recover these alleged costs, raising rates so high as to threaten the continued existence of a competitive SBR industry. Thus, if the Commission retains the "first carrier pays" rule, it should explicitly prohibit IXCs from charging more than the Commission-mandated default rate.

Does It Make A Difference Which Facilities-Based Carrier Tracks Payphone –Originated Calls?

It is of considerable importance from a technical and financial perspective that the SBR be permitted to track its calls and report to and compensate PSPs directly. It has been well documented in this proceeding that only the SBR can track its payphone-originated calls to termination: IXCs cannot. Any past statements to the contrary by SBRs either are falsehoods or are no longer true based on the existing technical capabilities of SBRs. Moreover, the importance of a direct SBR/PSP relationship extends beyond technical means. The costs imposed upon SBRs to compensate PSPs vary greatly, based upon whether the SBR is permitted to compensate the PSP directly or through the IXC. If the SBR is forced to indirectly compensate the PSP through the IXC, the SBR's costs are as much as 75% greater, due to the additional fees IXCs build into their per-call compensation costs. Therefore, if the Commission looks at the above question from the perspective of IXCs and SBRs – instead of PSPs– it must conclude that technical and financial reasons compel a direct SBR/PSP relationship.

Which Facilities-Based Carrier Ultimately Benefits From Tracking And Reporting And Should Pay For Its Costs?

SBRs ultimately benefit from per-call tracking and reporting, as evidenced by the fact that if they fail to do so, they may be charged for a 100% call completion rate by their IXC provider. However, the Commission must acknowledge that the tracking and reporting is done by the SBRs – not the IXC. SBRs, of course, already pay for the costs incurred tracking and reporting. They should not be required to pay "tracking and reporting" fees to IXCs when, in fact, IXCs engage in no per-call tracking whatsoever and their "reporting" is limited to simply compiling their SBRs per-completed call data and sending it to their third-party clearinghouse. Thus, if the Commission retains its "first carrier pays" rule, it should limit the rate IXCs may charge their SBR customers to the Commission default rate.

If The Commission Permits A Facilities-Based Carrier To Recover the Costs Of Tracking And Reporting, Would That Mitigate Any Financial Or Technical Burden That The Facilities-Based Carrier Might Arguably Incur?

Because the Commission has placed the liability for SBRs' failure to track properly and remit per-call compensation completely upon facilities-based carriers, arguably, permitting recovery for tracking and reporting (which, as demonstrated above, facilities-based carriers do not provide), does not mitigate all of the financial or technical burdens placed upon them. Theoretically, if a SBR customer tracks its calls inaccurately or reports its completed calls dishonestly, the IXC remains liable to the PSP. The only way to mitigate such an unfair burden for the IXC is to relieve IXCs of their tracking and reporting obligations and place such burdens on the primary economic beneficiary - the SBR. Of course, facilities-based carriers should not be relieved of their obligation to provide PSPs with the contact information of their SBR customers.

C. COMPENSATING PSPs FOR COMPLETED COINLESS CALLS

How Has The *Second Order on Reconsideration's* Compensation Mechanisms Have Operated in the Market?

The *Second Order's* compensation mechanisms have not had their intended effect on the market and, of equal importance, have harmed SBRs immeasurably. SBRs have even more burdensome tracking and reporting responsibilities as under the previous regime, yet they are required to pay 8 to 20% higher rates for IXCs' alleged tracking and reporting costs. Additionally, SBRs are required to remit payment on a monthly – instead of quarterly basis – even though the period of time carriers "held on" to their per-call compensation is a component of the per-call compensation rate, thus placing IXCs offering comparable services not only an interest-free loan, but a competitive advantage over SBRs. SBRs are also faced with per-call compensation rates that may increase to $0.43 or more, simply because the provision of "800" service has little competition and IXCs can raise rates while SBRs have no alternative providers. Finally, since SBRs and IXCs often compete in the same markets (e.g., calling cards, dial around service, etc.), IXCs can use these competitive advantages to gain market share. In conclusion, the *Second Order's* compensation mechanisms are an experiment that has failed and, presented with this unique opportunity, should be terminated.

Are PSPs Now Being Fully Compensated?

As stated *supra*, PSPs by their own admission are not being fully compensated by IXCs that have entered bankruptcy.[35] Additionally, PSPs may not be compensated by IXCs for their SBR customers when IXCs are either in dispute with their SBR customer or the IXC has reason to believe that the SBR will not reimburse the IXC due to financial

[35] *See,* APCC Comments at 15.

difficulties. Moreover, PSPs are less likely to be aware that they are not being compensated for a particular SBRs calls when dealing with an IXC than if dealing directly with the SBR.

Are IXC's Being Fully Reimbursed?

While IDT cannot state directly as to whether IXCs are being fully reimbursed – indeed, in many ways IDT believes IXCs have taken advantage of their SBR customers – it is clear that the current compensation scheme places IXCs at risk of non-compensation. Requiring the IXC to be responsible for payment on behalf of the SBR – the primary beneficiary – is fundamentally flawed. The SBR gains the reward and the IXC is given the risk – of the SBRs financial stability, willingness to pay, etc. If, for any reason the SBR cannot or does not pay its per-call compensation, the IXC is liable to the PSP.

Are There Alternative Compensation Mechanisms That Might Operate More Efficiently And Serve Section 276's Requirement That The FCC Ensure Fair Compensation?

As set forth below and throughout this document, the following guidelines should apply to per-call compensation when a call is sent from an underlying IXC to a SBR:

- A switch-based reseller is required to pay compensation and provide per-call tracking for calls originated by payphones if the carrier maintains its own switching capability, regardless if the switching equipment is owned or leased by the carrier;

- If a carrier does not maintain its own switching capability, then the underlying carrier remains obligated to pay compensation to the PSP in lieu of its customer that does not maintain switching capability;

- When facilities-based interexchange carriers providing toll free service have determined that they are not required to pay compensation on particular toll free calls because the calls have been routed to a switch-based reseller, the facilities-based interexchange carriers must cooperate with payphone service providers seeking to bill for the resold services;

- The minimum amount of "cooperation" shall entail: stating whether or not the facilities-based interexchange carrier is paying per-call compensation for a particular toll free number and, if it is not, it must identify its switch-based reseller customer by providing its name, address and contact person or department responsible remitting compensation. Upon providing this minimum amount of cooperation, the facilities-based interexchange carrier shall be relieved of liability for the calls provided to its switch-based reseller customer;

- Where a facilities-based interexchange carrier willfully or recklessly fails to meet the aforementioned amount of cooperation, thus avoiding the requirements of the Payphone Orders and Section 276, the facilities-based interexchange shall be liable to the payphone service provider(s) for the per-call compensation of its switch-based reseller customer;

- Where there are multiple switch-based resellers involved, the final switch-based reseller shall have the obligation to pay compensation and provide per-call tracking for calls originated by payphones;

- Where there are multiple switch-based resellers involved, each switch-based reseller's obligation to provide contact information to a payphone service provider, and the liability that flows thereunder, shall mirror that of the facilities-based interexchange carrier; and

- Facilities-based interexchange carriers and switch-based resellers liable for per-call compensation may provide tracking, reporting and compensation directly to payphone service providers or via independent third-party clearinghouses.

Whether The Commission Should, As It Did In The *Second Order on Reconsideration*, Amend Its Rules To Clarify Which Facilities-Based Carrier Is Responsible For Compensation.

The Commission should amend its rules to clarify the aforementioned principles wherein switch-based resellers are responsible for per-call compensation and eliminate the "first carrier pays" rule. The Commission should further clarify IXC, SBR and PSP obligations, thereby eliminating any concern that the appropriate party may be unaware of its responsibility to remit per-call compensation as well as the concern that PSPs will be unable to locate the party liable for per-call compensation.

If No Rules Were Adopted, Could Switch-Based Resellers Avoid Compensation Liability In the Manner in Which the Coalition Alleges? And How Could They Avoid Compensation?

PSPs have argued before the Commission that, "[g]iven the huge number of resale carriers in the United States, the vast majority of resellers appear to have reasoned that they can avoid compensation simply by 'keeping their heads down'."[36] While IDT does not accept this claim as accurate, even if the Commission did accept the claim, it should conclude that upon implementation and enforcement of the requirements set forth in the *Order on Reconsideration* and *The Coding Digit Waiver Order*, reaffirmed in the *Bell Atlantic – Frontier Order* and possibly codified in this proceeding, SBRs could not avoid compensation liability in the manner alleged by the Coalition.

Upon implementation of the requirements, an IXC must indicate, on request by the billing PSP, whether it is paying per-call compensation for a particular 800 number. If it is not, then it must identify the switch-based reseller responsible for paying payphone compensation for that particular 800 number. Similarly, if the IXC will not be the paying party because it transferred the call to a switch-based reseller, it is incumbent upon the IXC at that juncture to identify the reseller. The SBR shall then be responsible to the PSP for per-call compensation. Thus, there is no basis upon which a PSP can claim that SBRs may avoid per-call compensation simply by "keeping their heads down." As long as the PSP seeks compensation in the manner set forth by the Commission, it will be provided

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[36] *Third Order on Reconsideration* at ¶ 19. As noted above, the PSPs here fail to distinguish between switchless resellers and switch-based resellers. Under the previously existing rules as well as those which IDT supports, switchless resellers will not be responsible for their per-call compensation, as the underlying

with the contact information for the liable party. Furthermore, if the IXC fails to provide the required information, the IXC assumes liability. Either way, the PSP is absolutely provided with the liable party's contact information.

Of The Two Facilities-Based Carriers That Derive Primary Economic Benefit From A Coinless Call, Which One Should Be Required To Arrange For Fair Compensation To The PSP When A Coinless Call Is Completed Across the Facilities Of An IXC And A Switch-Based Reseller?

IDT takes great issue with the very premise of this question. "Primary," by definition, means, "(1) First or highest in rank, quality, or importance; principal; (2) Being or standing first in a list, series, or sequence."[37] Thus, there can only be one primary economic beneficiary from a coinless call. When a SBR uses the facilities of an IXC to provide service to a consumer, the SBR is the primary economic beneficiary. The Commission has previously reached the conclusion that "switch-based resellers were the primary economic beneficiary of payphone calls,"[38] and it seems to have revised this position in the *Second Order* solely to fit its revised model, rather than on any factual basis or analysis whatsoever. The Commission should rely on the analysis set forth in the *Order on Reconsideration* and conclude that the SBR is the primary economic beneficiary and should bear the responsibilities associated with its service.

Further, to conclude that an end-user service provider that resells the services of facilities-based carriers is not the primary carrier or primary economic beneficiary and thus, is deserving fewer rights or a lesser form of protection than facilities based carriers providing similar services over its own facilities is clearly contrary to the Commission's

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facilities-based carrier shall be, thus removing switchless resellers from the "huge number" of resale carriers."

[37] http://www.yourdictionary.com/ahd/p/p0557000.html

[38] *Third Report and Order* ¶ 6 *citing Order on Reconsideration*.

position regarding resellers as stated in other proceedings. For example, the Commission has held in *WATS International v. Group Long Distance* that Group Long Distance ("GLD"), a communications reseller was the *primary* interexchange carrier because GLD "sets the rates for the interexchange services it provides to its end users;" it had "the proximate business relationship with each end user," in contrast to the underlying carriers "had no contractual relationship" with the end users; and the "end-users remained the customers" of GLD, "the entity with whom they had contracted for service."[39] All of the aforementioned characteristics apply equally to SBRs. Thus, SBRs are the primary carrier and, by extension, the primary economic beneficiary. It is simply inconsistent with the *WATS Order* and the innumerable slamming cases that flow thereunder from its reasoning to conclude that a reseller is not the primary carrier and primary economic beneficiary and, as such, has less rights than a facilities-based carrier simply by virtue of the fact that it resells the service of another carrier.

Should The Facilities-Based Carrier That Tracks Coinless Calls Also Be Responsible For Providing Tracking Reports to the PSP?

Consistent with the above assertion that the SBR is the primary carrier and primary economic beneficiary, IDT believes that the facilities-based carrier that tracks coinless calls – such as the SBR – should also be responsible for providing tracking reports to the PSP. This approach is consistent with the Commission's preference that "ideally the carrier ultimately responsible for the payment of compensation should make payments directly to the PSP."[40] From an administrative perspective, there is simply no reason for having the SBR submit its report to the IXC, which simply takes that report

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[39] WATS International Corp. v. Group Long Distance, *Memorandum Opinion and Order,* 12 FCC Rcd 1743 (1997) (the "*WATS Order*")at ¶ 20.
[40] *Third Order on Reconsideration* at ¶ 11.

and re-submits it to the PSP. IXCs – due to their inability to track calls to completion – do not add any information to the SBR tracking report. Concurrent with that responsibility, however, must be the right to directly compensate the PSP. Absent the right to remit directly to the PSP, however, SBRs should not be required to report directly to the PSPs as they have no relationship – contractual or otherwise - in the absence of a tracking, reporting and payment obligation.

Are There Reasons Why It Might Be Reasonable To Require One Facilities-Based Carrier To Provide Tracking And Reporting And To Require The Other Facilities-Based Carrier To Be Responsible For Compensating The PSP?

IDT cannot conclude of a single instance wherein such an arrangement would be reasonable. Our conclusion, perhaps simply evidence of a lack of imagination, seems borne by the fact that prior to the implementation of the *Second Order's* requirements, SBRs and IXCs simply did not enter into duty-sharing agreements. Nevertheless, if the Commission declines to extend the "first carrier pays" rule beyond its September 30th deadline, IDT believes that if SBRs voluntarily agree to enter into such agreements with IXCs, they should be permitted to do so, provided PSPs are provided accurate information regarding the party responsible for per-call compensation.

Which Carrier Would Be Most Capable, Financially, Technically, And Administratively, Of Compensating The PSP And Recovering Compensation From The Other Carrier?

As demonstrated throughout, the SBR is the *only* carrier capable technically of providing accurate per-call completion data. Moreover, the SBR is the most capable administratively of providing per-call completion data. Finally, the SBR is as financially capable – if not more so – than any other carrier of compensating the PSP. Thus, if the

Commission permits the SBR to compensate the PSP directly, it obviates any need to examine inter-carrier compensation schemes.

Are There Any Other Relevant Factors In The Relationships Among IXCs, Resellers, LECs and PSPs That Would Enable One Type Of Carrier To More Effectively Compensate The PSP.

The primary factors in determining which provider is most capable of compensating the PSP are: (1) ability to track and report completed calls; and (2) financial stability. As demonstrated throughout IDT's Comments, only the SBR is in a position to track and report its completed calls. Furthermore, whereas in the past PSPs have suggested that many SBRs are small financially unstable companies, the recent bankruptcies of WorldCom and Global Crossing have demonstrated that size is a poor predictor of financial stability. Indeed, these bankruptcies have demonstrated that PSPs benefit from spreading their risk of nonpayment across the telecommunications sector, rather than focusing on a few large providers.

D. PRIVATE CONTRACTS TO PROVIDE COMPENSATION TO PSPs

If The Commission Were To Adopt Revisions To Its Compensation Rules As A Result Of The *Further Notice,* Should PSPs Be Permitted To Continue To Rely Upon Any Current Or Future Contractual Arrangements That They May Have With Underlying Facilities-Based Carriers Or Resellers?

IDT does not oppose PSPs' continued reliance on any arrangements they may have provided that (a) all parties – including SBRs, who may be parties directly or indirectly - to the arrangement agree to continue; and (b) the agreement in no way prohibits SBRs from directly compensating PSPs in a manner consistent with the Commission's rules, regulations and *Payphone Orders* promulgated thereunder.

Have PSPs Entered Into Direct Billing and Payment Arrangements With SBRs?

To the best of IDT's knowledge, no PSP has entered into a direct billing and payment arrangement with an SBR. This is in spite of the Commission's expressed concern that "ideally the carrier ultimately responsible for the payment of compensation should make payments directly to the PSP."[41] IDT believes this serves as explicit evidence that PSPs will not voluntarily enter into such arrangements and thus, the Commission cannot rely on voluntary participation and is therefore compelled to mandate such arrangements.

[41] *Third Order on Reconsideration* at ¶ 11.

CONCLUSION

For the reasons stated herein, IDT Corporation requests that the Commission revise the "first carrier pays" rules implemented in the *Second Order on Reconsideration* and explicitly require interexchange carriers to notify, upon the request of a payphone service provider, the contact information of their switch-based reseller customers, whom shall be legally bound to provide, upon the request of payphone service provider, per-completed call tracking, reporting and compensation to payphone service providers directly or via a third-party clearinghouse.

Respectfully submitted,

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Date Filed: June 23, 2003

CERTIFICATE OF SERVICE

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APPENDIX A

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

Section 64.1300(a): Except as provided herein, the last facilities based interexchange carrier to which a completed coinless access code or subscriber toll-free payphone call is delivered shall compensate the payphone service provider for the call at a rate agreed upon by the parties by contract.

Section 64.1310

(a) It is the responsibility of the last facilities-based interexchange carrier to which a compensable coinless access code or subscriber toll-free payphone call is delivered to track, or arrange for the tracking of, each such call so that it may accurately compute the compensation required by Section 64.1300(a). Upon request of the billing payphone service provider, the first facilities based interexchange carrier to which a compensable coinless payphone call is delivered by the local exchange carrier must indicate whether it is paying per-call compensation for a particular toll-free number. If it is not, then it must identify the carrier responsible for paying payphone compensation for that particular toll-free number by providing the name, address and contact person of the carrier responsible for paying payphone compensation. The carrier responsible for paying payphone compensation must send the payphone service provider a statement in computer readable format indicating the volume of completed calls from each of the providers properly identified payphones, and the toll free and access numbers associated with those calls at the time dial around compensation is due to be paid, unless the payphone service provider agrees to other arrangements.

(b) The last facilities based carrier responsible for paying payphone compensation may compensate payphone service providers directly or via a clearinghouse arrangement. Carriers and resellers may establish new arrangements or continue any other arrangements that they have with payphone service providers for the billing and collection of compensation for calls subject to Section 64.1300(a), however, the first facilities based carrier to whom a completed coinless payphone call is delivered cannot limit the ability of the carrier responsible for paying payphone compensation to enter into an agreement to remit compensation directly to payphone service providers or via a clearinghouse arrangement.